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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 704

UNITED STATES OF AMERICA ex Rel. ENG FON SING,

Petitioner,

vs.

BYRON H. UHL, District Director of Immigration and Naturalization at the Port of New York, or Any Other Person Having the Body of Said Eng Fon Sing in Custody.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner, Eng Fon Sing, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause on the 16th day of July, 1941, affirming an order entered in the District Court of the United States for the Southern District of New York dated the 15th day of July, 1940, dismissing a writ of habeas corpus obtained by your petitioner and remanding your petitioner to the custody of the District Director of Immigration and Naturalization at the Port of New York for deportation.

Your petitioner respectfully represents:

That the issues raised by the return to the writ of habeas corpus were duly submitted to the District Court and resulted in the dismissal of the writ, as aforesaid. The opinion of the District Court is set forth on pages 71-75 of the record on appeal to the United States Circuit Court. An appeal from said order was affirmed by the United States Circuit Court of Appeals as appears by the *Per Curiam* opinion on page 90 of the record on appeal.

Jurisdiction.

1. The jurisdiction of this Court is invoked under Section 240, Subdivision (a) of the Judicial Code, as amended by the Act of February 13, 1925, C. 229, Section 1, 43 Stat. 938; 28 U. S. C. A., Sec. 347 (a)

2. The decree of the United States Circuit Court of Appeals for the Second Circuit, called the mandate, sought to be reviewed, is dated July 16, 1941. Said decree affirms the order of the District Court in favor of the respondent here.

Statutes Involved.

The statutes involved are Section 1993, R. S. (8 U. S. C. A., Sec. 6), Section 17 of the Immigration Act of February 5th, 1917, C. 29, 39 Stat. 887 (8 U. S. C. A., Sec. 153), and Section 13 (c), Immigration Act of May 26, 1924, C. 190, 43 Stat. 161 (8 U. S. C. A., Sec. 213 (c), all of which, except Section 17, are set forth in full in the Appendix attached hereto.

Summary Statement of the Matter Involved.

The petitioner is the foreign born son of Ng Goot Foo, whose citizenship is conceded (fol. 123). Petitioner arrived at the Port of New York from China on October 6, 1939 (fol. 32). His case was heard by a Board of Special

Inquiry at Ellis Island, appointed under Section 17 of the Immigration Act of February 5th, 1917 (8 U. S. C. A., Sec. 153) (fols. 31-195). The Board determined that petitioner's claimed relationship "has not been reasonably established" and excluded him as "an alien ineligible to citizenship, not a member of any of the exempt classes, and inadmissible under Section 13 (c), Immigration Act of 1924" (fol. 134). An appeal to the Board of Review of the Department of Labor (now Department of Justice) was dismissed and the Secretary of Labor affirmed the order of exclusion (fols. 209-210). Petitioner's father then applied for a writ of habeas corpus (fols. 4-18) which was allowed by the District Court and a writ issued (fols. 19-21). A return to the writ was filed by the Immigration Department (fols. 22-30) and the matter was submitted to the District Court which rendered its written opinion dismissing the writ (fols. 212-225) and ordered petitioner remanded for deportation (fols. 226-230). An appeal was taken to the United States Circuit Court of Appeals for the Second Circuit, which affirmed the order of the District Court on July 16, 1941.

Petitioner's father was admitted to the United States as the foreign born son of a native citizen on November 22, 1921.

In order to establish his citizenship, petitioner was required to establish the alleged relationship to his father and also that he was born on or after the date when the father was admitted to the United States. (*Weedin* v. *Chin Bow*, 274 U. S. 657, 675.)

To support his claimed relationship, petitioner offered his own testimony (fols. 68-94), that of his alleged father (fols. 31-49; 95-104) and that of his alleged brother, Ng Fon Lem (fols. 50-66; 104-106), all of which was to the effect that petitioner was born on December 4th, 1921 (fols. 36, 54, 69), which was after the alleged father arrived in the United States. Petitioner was therefore, according to his claim, 18

years old less 6 days at the time he had his first hearing. The most searching examination failed to reveal any discrepancy in the record and this was conceded by the Department (fol. 199). Nevertheless petitioner was excluded on the ground that the Board believed him to be over 21 years of age. This belief is predicated on a suspicion implanted in the minds of the immigration authorities, by reason of a slight discrepancy involving the date of birth of the petitioner, during the examination of petitioner's brother for admission to the United States in 1936.

Summarizing the testimony in petitioner's brother's case (fols. 246-248), the Chairman of the Board indicated three years before petitioner came here that petitioner would be excluded if he ever applied for admission. The Chairman said:

> "While reflecting upon the credibility of the alleged father in this case, I do not deem that phase of the matter to be of sufficient gravity to militate against the present applicant, *and may properly be considered if and when Ng Fon Sing should ever attempt to apply for admission to this country.*" (Italics ours), (fol. 248)

Although petitioner's father explained the slight mistake and the reason for giving a wrong birth date for petitioner, and explained how it was physically impossible for petitioner to have been born only five and a half months after the marriage of petitioner's parents, the immigration authorities, while recognizing that there was no basis for exclusion on the ground of discrepancies, undertook to exclude petitioner because, as they put it, petitioner appeared to be older than he claimed to be.

Petitioner was subjected to an examination by a doctor of the United States Public Health Service who declared that he believed petitioner to be over 21 years, and "probably 22 to 25 years" of age (fol. 110). At a reopened hearing

petitioner submitted the testimony of Dr. Maurice M. Pomeranz, a noted authority on roentegenology and the subject of epiphyseal development, who testified to a careful, scientific analysis on epiphyseal development and demonstrated the impossibility of ascertaining age with accuracy from epiphyseal growth. He showed further that the growth of Chinese persons is very different from that of other ethnical groups of European-anthropological stock (fols. 156-158; 165). After carefully analyzing the X-rays taken of petitioner by the United States Public Health Service, Dr. Pomeranz produced X-ray films which he had taken of petitioner's brother, 15 years of age, and showed from these X-rays that identical parts of petitioner and his brother indicated that there was a variation of epiphyseal development in petitioner's family "tending towards acceleration of these centers" (fol. 177). Dr. Pomeranz therefore concluded that petitioner could be of the claimed age of 18 years (fol. 178).

The immigration authorities then recalled the United States Public Health Service doctor who did not contradict Dr. Pomeranz but merely stated that the testimony given by Dr. Pomeranz was similar to that given by him in ~~the~~ other cases (fol. 189). The immigration authorities promptly re-excluded petitioner.

Specification of Errors.

It is submitted that the conduct of the immigration authorities in injecting the "age" question into this case was primarily for the purpose of excluding petitioner in order to give force to a predisposition founded upon unsupported suspicion, and that petitioner was not afforded a fair hearing and that he never had a fair chance to get a fair hearing.

The District Court after observing the limited power of the court to review decisions of administrative bodies con-

tented itself with stating that *if a fair hearing had been accorded to petitioner and the decision reached was not wholly arbitrary, it was conclusive* (fols. 223-224), and thereupon, taking it for granted that a fair hearing had been given petitioner, felt constrained to sustain the administrative officials.

It is submitted that in the light of prevailing decisions of this Court, which petitioner sets forth in his accompanying brief, no consideration was given to the elements of unfairness and arbitrariness which prevailed either by the District Court or by the Circuit Court.

The United States Circuit Court of Appeals for the Second Circuit merely affirmed citing: *United States ex rel. Ng Kee Wong* v. *Corsi,* 65 F. (2d) 564 (C. C. A. 2) and *United States ex rel. Mark Guey Him* v. *Reimer,* 115 F. (2d) 241 (C. C. A. 2).

It is respectfully submitted that the Circuit Court of Appeals erred in ignoring petitioner's complaint of unfairness and gave credence to the simulated issue raised by the immigration authorities to the effect that petitioner was older than he claimed to be, without consideration of petitioner's plea that said feigned issue had been injected intentionally for the purpose of lending color to a pretended fair hearing and to support the exclusion order, notwithstanding that petitioner sustained the burden of proof resting upon him.

It is further submitted that the Circuit Court of Appeals erred in failing to recognize that the conduct of the immigration authorities constituted unfairness, arbitrariness and flagrant disregard of the uncontradicted credible testimony, scientific and otherwise, submitted by petitioner as to his relationship and age.

It is further respectfully submitted that the learned Circuit Court of Appeals rested its *Per Curiam* opinion upon

the cases of *Ng Kee Wong* v. *Corsi*, 65 F. (2d) 564 (C. C. A. 2) and *Mark Guey Him* v. *Reimer*, 115 F. (2d) 241 (C. C. A. 2), yet the test laid down by the *Ng Kee Wong* case was fully met by petitioner, for there was not the slightest evidence against paternity in the record.

Wherefore it is respectfully prayed that this petition for a writ of certiorari be granted.

ENG FON SING,
Petitioner.